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Nos. 87-826, 87-1101

In The

Supreme Court of the United States

October Term, 1987

JEROME F. GOLDBERG, ROBERT McTIGUE
and GTE SPRINT COMMUNICATIONS CORPORATION,
Appellants,

v.

ROGER D. SWEET, Director of the Illinois
Department of Revenue, and JEROME COSENTINO,
Treasurer of the State of Illinois,
Appellees.

On Appeal from the
Supreme Court of Illinois

REPLY BRIEF OF APPELLANT GTE SPRINT COMMUNICATIONS CORPORATION

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Appellees and *Amici* Assert Newly-Raised "Facts" on Call Charging Patterns which only Confirm that the Tax is Unconstitutional

GTE Sprint introduced facts below never controverted by the State. Nor were those facts disputed by MCI when it challenged the tax and obtained judgment in the trial court on its claim that the Illinois tax violates the Commerce Clause. R. C 1044-46.[1] Yet, the State and MCI (ostensibly as "*amicus*") have presented several new "facts," in an attempt to elevate the charging of a call to an Illinois service address to a sale, billing, call-origination or other economically significant event which can support apportionment of the tax.[2] These newly-introduced "facts," regarding allegedly typical ways long distance calls are charged, cannot so transform the charge address, however, and merely confirm the tax is unconstitutional.[3]

Most significantly, MCI admits at the outset that:

> By customary usage in the industry, a "*service address" is the location of a telephone* or other telecommunications device *and is not necessarily the same as the address to which the bill is sent.* For exam-

[1] MCI now urges, as "*amicus*," that the Illinois tax *is* constitutional. But MCI should be estopped from so changing its position. *See, e.g., Allen v. Zurich Insurance Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982). In addition, although the MCI position has been submitted as representative, AT&T and other carriers have challenged taxes very like the Illinois tax, as unapportioned and violating the Commerce Clause. *See* Plaintiffs' (AT&T's) Proposed Findings of Fact ¶¶ 37, 38 and 43, *American Telephone and Telegraph Company et al. v. District of Columbia*, C.A. 8599-87 and C.A. 10080-87 (Superior Ct. D.C. filed Oct. 7, 1987) in App. A hereto; *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364 (7th Cir.), *cert. denied*, 461 U.S. 960 (1983) (judicial notice of pleadings permitted).

[2] The State's facts are improperly introduced here, so should be disregarded in any event. *See, e.g., Wisconsin Higher Education Corp. v. Bear*, 789 F.2d 577, 579 (7th Cir. 1986).

[3] The same may be said of the nearly-identical "facts" submitted by *amicus*, The National Conference of State Legislatures, *et al.* *See* Nat'l Conf. Br. at 4-10.

> ple, an individual with a telephone at his vacation home (the service address) might have the bills for that telephone sent to his primary residence (the billing address). Similarly, *a corporation with many offices might have the phone bills for all of them sent to its headquarters.*

MCI Br. at 4 (emphasis added). MCI thus admits that where a call is charged will not necessarily coincide with where that call is billed. The practice manual utilized by a GTE local exchange company confirms that, in the industry, the service address is the phone location and does not necessarily coincide with the billing address, which a customer arbitrarily selects.[4]

Other new "factual" assertions made by the State and MCI to identify the Illinois charge address with the call origination location are simply in error. For example, the State and MCI allege that, "typically" or "normally," a call originating in Illinois will be charged to an Illinois service address, which MCI identifies as the location of a telephone, but that a call terminating in Illinois will not be. State Br. at 3; MCI Br. at 4-5. But they so allege this pattern obtains without any substantiation. Indeed, MCI itself admits elsewhere that calls may originate and terminate in locations totally divorced from where the call is charged (*e.g.*, credit card calls). MCI Br. at 5.

Further, this Court may take judicial notice of the fact that the State's allegedly "typical" pattern is no pattern at all: Carriers like Sprint (competitors of AT&T) do not necessarily possess information on the location of phones used to make particular calls and do not use, as a consequence, a "service address" for charging or billing calls. Sprint's closest equivalent to a service address is the "bill

[4] *See* excerpts from *GTE Northwest Inc. Practice Service Office System Series* in App. B hereto. *Bethel Conservative Mennonite Church v. Commissioner*, 746 F.2d 388, 392 (7th Cir. 1984) (judicial notice of readily verifiable internal corporate documents permitted).

to" address, arbitrarily designated by the *customer* when the customer subscribes to Sprint service. In addition, even those carriers who might purchase "service address" billing services or information from the local exchange carriers are not compelled to do so, and some even bill through third-party vendors. There is simply no mandatory way for carriers to charge or bill their customers. It is impossible to conclude that there is any certainty that all calls charged (or billed) to Illinois will represent Illinois-originated calls, then.[5]

With similar lack of substantiation, the State claims that, within the "universe" of long distance calling, it can be "predicted" that one-half of calls originating/terminating in Illinois will be charged to an Illinois address, so that the Illinois tax is "apportioned" to half the Illinois calls, by virtue of this charging pattern. The State also alleges that the "majority" of calls are charged and billed to the same number, so that these are equivalent events. State Br. at 16-17, 27-28 and 29. Yet when Sprint's and other carriers' long distance calls are not charged to a service address, a "bill to" address is a matter of customer choice, and carriers can handle their charging and billing procedures in any way they choose, the State can make no claim that bill or "charge" locations will be split neatly between Illinois and the state on the other end of the call, nor that the "bill" and "charge" location will coincide, except serendipitously. *See* discussion *supra* and fn. 5.

The State and *amici* also cite a Department of Justice study to claim that the economic significance of out-of-state transmission activity to Illinois long distance phone calling is minimal. They make the claim, of course, because

[5] *See* Sprint Customer Order Form (App. C hereto); *Bethel*, 746 F.2d at 392 (judicial notice of corporate documents permitted). *See also* Report and Order, *In re Detariffing of Billing and Collection*, CC Docket No. 85-88 at 3-4, 9-11, 14-15, 22, 24-25, 27-28, released Jan. 29, 1986. *Finish Line Express, Inc. v. Chicago*, 72 Ill. 2d 131, 379 N.E.2d 290 (1978) (judicial notice of filed public documents permitted).

the Illinois tax ignores this out-of-state calling component. State Br. at 18-20; MCI Br. at 1-2; Nat'l Conf. Br. at 5-10. However, US Sprint's tariffs, filed with the Federal Communications Commission, reveal that carriers' tariffs and call charges do vary with the distance of the call. *See* Excerpts from US Sprint Tariffs, Tariff F.C.C. Nos. 1, 2 and 3 in App. D hereto.

In sum, the Illinois tax is simply not a tax on calls billed, sold, or originated in Illinois and, even if it could, the State cannot rely on the alleged external charging behavior cited to demonstrate that the tax is confined to such calls.[6]

ARGUMENT

I. The Illinois Tax Is Not Fairly Apportioned

A. The Limit of the Tax to Simply Less than All Call Charges Does Not Apportion It

The State argues that "[t]he fact that Illinois taxes only a portion of the telephone calls which it has nexus to tax, demonstrates that the Act is apportioned." State Br. at 11. If this were true, any interstate calling tax with an arbitrary limit (*e.g.*, every fourth call originated or received in the taxing state) could be apportioned. Likewise, an income tax on a multi-state business could be deemed "apportioned" if it were limited to some random portion of the taxpayer's business activities. Such a result would be absurd, however, and defies *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983) which demands that the

[6] The State also repeats, as a "fact," the Illinois Supreme Court's clearly erroneous conclusion that the Illinois tax covers Illinois originating/terminating interstate calls which are *billed* or *paid in Illinois*, trying to make the tax appear more akin to a traditional sales tax. State Br. at 4. But, clearly, the tax, as the State and MCI elsewhere admit, covers calls *even where they are billed or paid for outside Illinois*. State Br. at 9; MCI Br. at 4; *see also*, GTE Sprint Br. at 5, 10, 19, and 22.

apportionment mechanism confine the tax to some proxy for value obtained from the state. GTE Sprint Br. at 29-31.

B. The Tax Is Not Limited to Half of the Call Charges and, therefore, Is Not Apportioned by Such a Limit, Nor Could It Be

The State suggests that the Court consider *collective* call charging behavior in assessing apportionment of the tax. It "predicts," for example, that, as to Illinois-Indiana calls, "approximately one-half of those calls will be charged to service addresses in Illinois, the other half to service addresses in Indiana" so that the tax will be "apportioned" by this charging pattern to one-half of Illinois originating/terminating call charges. State Br. at 16-17. Yet *nothing* in the tax itself guarantees such an allocation of call charges. Further, GTE Sprint has demonstrated that, for some carriers, there is no "service address charge" but only a customer-chosen "bill to" location. Since the "bill to" address for these calls is arbitrary, any division of call charges or billings as the State describes could only be fortuitous. Moreover, even the unidentified carriers or taxpayers who might currently charge as the State suggests could change their billing systems or charging practices tomorrow. *See* discussion and fn. 5 *supra* at 3 and App. B and C hereto. Thus the State's dependence on arbitrary and unpredictable external charging/billing behavior to apportion the tax simply underscores the tax's unconstitutionality. *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, — U.S. —, 107 S. Ct. 2810, 2819 (1987) (tax cannot meet Commerce Clause requirements fortuitously); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 76 (1963) (Brennan, J., concurring). GTE Sprint has proven the "charge" mechanism cannot save the tax.[7]

[7] *Maryland v. Louisiana*, 451 U.S. 725, 759-60 (1981) (party need only adduce facts to show tax is unconstitutional and need not demonstrate just *how* unconstitutional it is); *American Trucking Associations, Inc. v. Scheiner*, — U.S. —, 107 S. Ct. 2829, 2842 (1987) (tendency of tax to be unconstitutional invalidates it).

Worse, however, is the State's assumption that a division of call charges could ever operate to apportion the tax. As MCI admits, calls charged to an Illinois address may nevertheless still be billed and paid for outside Illinois, so the charge location is not the site of the call's sale. *See* MCI Br. at 4 and p. 2, fn. 4 *supra*. Nor does the location of the call "charge" identify Illinois costs incurred to provide the service, the location of Illinois participants, nor that part of Illinois transmission activity conducted to generate a call. MCI Br. at 4; GTE Sprint Br. at 25. The charge location simply does not correspond to the site of the economically significant components of interstate calling, and cannot serve to apportion the tax, under any circumstances. *See* GTE Sprint Br. at 29-31.

C. The Tax Cannot Be Compared to a Sales, Use or Gross Receipts Tax

Both courts below rejected the State's arguments that the tax is a sales or use tax, finding that the tax could not be construed as a tax on local activity. GTE Sprint Br. at 7-8, 17-23. The State now contends that the Illinois tax "is *functionally* indistinguishable from sales, use and gross receipts taxes previously upheld by this Court." State Br. at 12 and 13, fn. 5 (emphasis added). In doing so, the State simply fails to comprehend the monumental difference between the models it cites and the Illinois tax.

1. The Sales/Use Tax Model Is Inappropriate: The Illinois Tax Is Assessed on Multi-State Service with No Single Situs for Sale/Use and, unlike the Constitutional Sales/Use Taxes, Must Be Apportioned

In the post-divestiture world of interstate communications, the "sellers" of service are the carriers with facilities to provide calls in every state (or resellers who utilize such facilities). The service is provided and enjoyed by virtue of simultaneous multi-state activity. The bills for services may be sent to any location the customer

chooses and the customer may choose to pay anywhere. *See* GTE Sprint Jurisd. Statement at 3-5, App. C thereto; Goldberg Jurisd. Statement at 9a, 21a (court finds "[a] person . . . cannot make or receive an interstate telecommunication without activating and participating in a complex network of interstate transmissions. . ."); GTE Sprint Br. at 3-4, 7-8; App. B and C hereto, discussed at 3 and fn. 5 *supra*. There is thus no single *local* place for the seller to "sell" or for the buyer to "buy" or for the buyer to "enjoy" -- as with tangible goods -- so that a "local" tax may be levied on one of these events.

Because of this, the Illinois tax, even as limited to calls charged to an Illinois service address, in no way resembles either a sales or use tax on the *local* transfer or enjoyment of goods. Unlike a traditional sales tax, for example, the Illinois tax, acknowledging reality, specifically applies to calls which may be charged in Illinois but billed or paid out-of-state. GTE Sprint Br. at 5, 22 and 27, fn. 8; MCI Br. at 4. Indeed, if the State were correct in analogizing the Illinois tax to a "sales" tax, the *tax would fail, in any event,* because the tax, as drafted, would still cover calls purchased (billed/paid) outside Illinois. *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944) (sales tax unconstitutional where it covers purchases occurring outside taxing state).

Nor can the tax resemble a use tax, when it is clear that the caller enjoys services outside the state even as he or she originates or receives a call in Illinois. Further, the call participant through whom a call is charged or billed may not even be in Illinois to make or receive a call charged there (as MCI admits). MCI Br. at 4. There is no altogether local Illinois "use" taxed here. *See* discussion *supra* at 6-7.

Ignoring these facts, the State cites a selection of inapplicable sales and use tax cases to argue that the tax is apportioned. For example, the State cites *McGoldrick*

v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940) where the Court upheld a sales tax on the purchase of goods shipped from out-of-state. But the tax in *McGoldrick* was confined to a clear, traditional transfer of a tangible good in the taxing state because the sales office was located and receipt of contracts and delivery of goods took place in the taxing state. Thus, no apportionment was necessary.[8] Here, the tax is not confined to any such traditional local transfer because the billing and payment can occur outside Illinois.

Similarly, in *D.H. Holmes Co. v. McNamara*, — U.S. —, 108 S. Ct. 1619 (1988) the Court approved a Louisiana use tax on the distribution of mail order catalogs. There, however, the tax was strictly limited to the in-state distribution of catalogs (and therefore apportioned). *Holmes*, 108 S. Ct. at 1624. The same cannot be said here with regard to a service which is provided and concomitantly enjoyed by virtue of multi-state activities.[9] As are the sales and use taxes which they upheld, *McGoldrick* and *Holmes* are simply inapposite here.[10]

[8] Central to the outcome in *McGoldrick* was the fact that the taxed activity met traditional legal criteria for a local sale of goods. *McLeod v. J.E. Dilworth Co.*, 322 U.S. at 329 ("According to practical notions of what constitutes a sale . . . reflected by what the law deems a sale, [the taxed activity] constituted a sale in New York and accordingly we sustained a retail sales tax by New York").

[9] Other states have recognized that taxes on multi-state telecommunications service are fundamentally different from taxes on in-state sales or uses of tangible property. The Florida legislature, in fashioning a proposed service tax on telecommunications, devised six *different* methods for actually *identifying* the location of the "sale" or "use" of the interstate service. Only if Florida first qualified as the "sale" or "use" locale was the tax applied, and then only according to an apportionment formula. J. Mills, *The 1987 Legislative Session*, 1987 Fla. St. Univ. L. Rev. 607, 631-634 (1987).

[10] Likewise, in *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 441-42, 443 (1940), dividends paid "out of income derived from property located and business transacted" in Wisconsin "calculated ac-

(Footnote continued on following page)

2. The Gross Receipts Tax Model Is Inappropriate: The Illinois Tax Does Not Have a Sales Apportionment Formula and Even If It Did, It Could Not Apportion the Tax

The State also mistakenly relies on *Standard Pressed Steel Co. v. Department of Revenue*, 419 U.S. 560 (1975), upholding Washington's business and occupation tax levied upon the gross receipts from sales of aerospace fasteners, and *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978), upholding a net income tax. State Br. at 15; MCI Br. at 12. Both of these taxes were apportioned by being limited to an in-state percentage of total interstate sales of tangible goods. Here, however, the Illinois charged call limit is not a limit of the tax to calls "sold" in Illinois since those calls, though "charged" to an Illinois address, can be billed or paid elsewhere.

Even if the Illinois tax *were* limited to in-state sales, the *Standard* and *Moorman* cases would not control. Although in-state sales may reflect a fair in-state portion of interstate gross receipts or incomes, in-state sales of long distance calls cannot serve as a fair reflection of Illinois transmission, origination, termination, investment, costs or economic support which goes into interstate calling because the place of sale has no logical relationship to these activities or events. *See* discussion *supra* at 2-3, 5-7; GTE Sprint Br. at 29-31. Indeed, commentators have criticized *Standard* and *General Motors Corp. v. Washington*, 377 U.S. 436 (1964), upon which *Standard* relied, as having produced unsatisfactory results -- especially with regard to apportionment -- precisely because of the frequent inability of sales to reflect, in any economically realistic sense, the

[10] *continued*
cording to the . . . formula . . . employed in assessing the general corporate income tax. . ." were taxed. Thus, the tax "was [already] apportioned," unlike the Illinois tax. *See* State Br. at 13.

taxing state's contribution to multi-state activities.[11] Here, the fragmented "sales" locations do not reliably reflect the location of the economically significant components of interstate calling, so reliance upon *Standard* and *General Motors* is misplaced.[12]

D. The State's Administrative Inconvenience Argument Is Misdirected: The Arbitrary Limit of the Tax Is Not the Only Realistic Alternative to a True Apportionment Formula, as Other States' Formulas Show

The State argues that GTE Sprint has espoused "mileage-based" or "call-by-call" apportionment, but that such apportionment methods are too burdensome administratively and far inferior to the method employed by the Illinois tax. Thus, the State claims the Illinois method is the only apportionment alternative. State Br. at 16-17, 21. These attacks on straw men are misdirected. GTE Sprint has not argued that these methods of apportionment are the only acceptable ones by simply noting that the current tax ignores numerous significant economic components of interstate calling (such as transmission) or by showing that, on an individual call basis, the tax is not apportioned. *See* GTE Sprint Brief at 3-4, 30-31 and fn. 11.

Further, the State's contention that there is no calculable alternative to the tax's current "apportionment" method is demonstrably wrong. For example, it cannot be controverted that approximately sixty percent of long distance phone call costs derive from access charges assessed by the local exchange carriers for picking up and dropping off calls. Dept. of Justice, *The Geodesic Network: 1987 Report on Competition in the Telephone Industry* at 3.49 (1987); *Finish Line Express, Inc. v. Chicago*, 72 Ill. 2d 131, 379 N.E.2d 290 (1978) (judicial notice of investigative reports of public agencies permitted). Any originating/terminating state might therefore "apportion" a tax on long distance calls by limiting it to thirty percent of the call charge which represents the economically-significant in-state pickup (or drop-off) cost of the call.

[11] J. Hellerstein, *State Tax Discrimination against Out-of-Staters*, 30 Nat'l Tax J. 113, 123 (1977) ("[T]he Washington business activities tax [at issue in both *General Motors* and *Standard*] ought to have been treated, not in the way retail sales tax cases have been decided, but as an excise on the privilege of doing business. Mr. Justice Brennan, therefore, was on impeccable ground in concluding in his dissent from . . . the *General Motors* case that the tax was unconstitutional for lack of apportionment").

[12] Some unapportioned "gross receipts" taxes have been upheld as taxes assessed "in lieu of" property taxes. The long distance carriers are already taxed on their Illinois property, however. Ill. Rev. Stat. ch. 120, §§ 482 *et seq.* (Supp. 1988).

Other, more sensitive calibration is also possible. The State of Hawaii has passed a four percent excise tax on interstate and foreign telecommunications covering calls originating/terminating and billed in Hawaii, and the Hawaii Department of Taxation has developed, with the help of the industry, a proposed cost-based formula to apportion it. Hawaii Rev. Stat. § 237-13(6) (Supp. 1987); Hawaii Adm. Rules, Section 18-237-13(f) (1988) (proposed June 21, 1988) (published *Honolulu Advertiser*, July 7, 1988, at D4, col. 1-3); *see* App. E and F hereto.[13] Additional states have apportioned their taxes on interstate telecommunications using other economically-sound factors: New York apportions its gross receipts tax on a property factor (N.Y. Admin. Code tit. 20, § 72-1 (1987)); Virginia apportions on the basis of circuit capacity (*see* Goldberg Br. at 29); and Wisconsin factors combined property and originating call revenue to do so

[13] Under this formula, if, on average, 30% of a carrier's overall costs on covered calls are attributable to Hawaii, the tax due for each call would be calculated as follows: Call charge × 30% (or whatever average percentage of overall costs are) × 4% tax rate = tax on gross income from such call. *See also Roemer v. Board of Public Works*, 426 U.S. 736, 742 (1976) (judicial notice of state regulations); *People v. Pollution Control Board*, 103 Ill. 2d 441, 469 N.E. 2d 1102, 1105 (1984) (judicial notice of proposed regulations).

(Wis. Stat. Ann. § 76.38 (West Supp. 1987)).[14] The State is simply wrong in suggesting "charge" apportionment is the only workable method, and must be accepted. *American Trucking Associations, Inc. v. Scheiner*, – U.S. –, 107 S. Ct. 2829, 2847 (1987) and fn. 27 (where other states have implemented alternative apportionment methods, argument that alternatives are impossible is baseless).

The experience in other states also proves that the actual assessment of taxes, using such alternative formulas, will pose no administrative burden. State Br. at 16-18 and 23. Businesses can and do assess taxes using such mathematically-devised formulas, applied to bills by computer. *See* R. Westphal, *The Computer's Role in Simplifying Compliance with State and Local Taxation*, 39 Vand. L. Rev. 1097 (1986). Further, contrary to the State's assertion, more sensitive alternative formulas are indeed "superior" to the Illinois example since the Illinois method is completely arbitrary while the other cited formulas utilize economically substantive *indicia* of Illinois contributions to interstate calling and would foreclose the substantial and non-incidental overlap in taxes which the Illinois tax creates. *Container*, 463 U.S. 159, 169 (1983); GTE Sprint Br. at 26-31.

E. *D.H. Holmes* Does Not Demonstrate that the Credit Provided in the Illinois Tax Can Apportion that Tax

The State, citing a statement from *D.H. Holmes Co. v. McNamara*, – U.S. –, 108 S. Ct. 1619, 1623 (1988) to the effect that the credit provision in a use tax can serve to "apportion" it, claims that the Illinois tax's credit provision likewise apportions the tax. But the tax in *Holmes*

[14] Even mileage apportionment formulas exist. Florida apportions its sales and gross receipts taxes on interstate private line telecommunications services using Florida mileage. GTE Sprint Br., App. A at 1a. The Florida tax on non-private line services does *not* utilize the Illinois approach. *See* GTE Sprint Br. at 36.

was confined to a local "use" -- the entirely in-state distribution of catalogs. Thus the only "apportionment" problem *Holmes* dealt with was the possible assessment, by another state, of a sales tax on the Louisiana-distributed but foreign-purchased catalogs. Louisiana therefore provided a credit for paid sales tax, to address residual multiple taxation which might arise from the unique collision of the legally "complementary" sales and use taxes.[15]

The *Holmes* credit mechanism served to solve an anomalous residual multiple tax problem, then. And it did so arbitrarily, by allowing the absolute amount of the paid sales tax to simply reduce or eliminate the use tax, without an attempt to divide the tax revenue between the taxing states according to the respective states' real economic contribution to the taxed activity. GTE Sprint Br. at 41-42, citing *Halliburton*, 373 U.S. 64, 76 (Brennan, J., concurring). That may have been an adequate solution with regard to use/sales taxes since there is simply no economically realistic way of determining what percentage of a taxed activity a "sale" represents, as opposed to a "use," as "sale" and "use" are not two aspects of seamless interstate activity. But this type of arbitrary credit cannot be deemed an adequate solution here, because, here, by contrast, an economically realistic division among the states of the seamless whole *is* possible. *See* discussion *supra* at 10-12.

Moreover, some realistic division among the states of such a seamless whole is *necessary*. If the *Holmes dicta* signifies what the State suggests, states could eschew apportioning taxes on unified multi-state activities, leaving

[15] These separate events -- sales and use -- have been considered legally equivalent tax events in order to prevent out-of-state purchases from escaping taxation because the taxing state would not have sufficient nexus to force the out-of-state seller to collect the tax. Here the carriers or "sellers" operate and can be required to collect tax everywhere. *See* GTE Sprint Br. at 3-4, 43.

to credit provisions the job of doing so. But, for these types of taxes, the credit simply could not shoulder the burden. Taking the example of the Illinois tax, credits would be necessary not on casual sales, but for vast numbers of incessant, individual telephone calls, on a monthly basis. In addition, nexus problems endemic to use tax assessment, and the consequent sporadic collection of these taxes, indicate that, realistically, use/sales taxes present a less-frequent need for a credit to cure overlap than that which would be presented by consistently-applied taxes on seamless interstate activity, like telecommunications.[16] Allowing the credit provision to "cure" the enormous apportionment problem posed by the Illinois tax (or an income tax on multi-state business) would do nothing but generate a dizzying round of chaotic credit proceedings which would crush both callers and other states with the cost and burden of dividing the tax among them.[17] Such a startling result cannot be the holding of *Holmes*.[18]

---

[16] *See, e.g.*, B. Henszey, *Use Tax Collection: Past, Present and Future*, 25 Am. Bus. Law J., 635-37 (1988); GTE Sprint Br. at 44. *See also* fn. 15 *supra* (states will have nexus to consistently require carriers to assess tax).

[17] To make matters worse, the credit system would be obliged to cure multiple taxation that results when another state assesses tax on the sale of access services, on a different taxpayer. Further, who will arbitrate which phone taxes can be credited against one another? The credit provision appears to be an unmanageable solution for these problems. *See* GTE Sprint Br. at 5, 37-38, 43.

[18] Indeed, sales/use taxes, as opposed to taxes on unified interstate activities (like the tax at issue here or a tax on multi-state income), pose no real apportionment problems:

> Where . . . [a] tax is assessed not on unitary income but on discrete events such as sale, manufacture, and delivery, which can occur in a single State or in different States . . . [the] apportionment principle is not applicable; there is simply no unitary figure or event to apportion.

Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, — U.S. —, 107 S. Ct. 2810, 2824-25 (1987) (Scalia, J., dissenting).

II. The Illinois Tax Discriminates against Interstate Commerce

A. The Equal Tax Rate Discriminates as It Places a Disproportionate Burden on Interstate Calls because of their Interstate Nature

In *Nippert v. Richmond*, the Court invalidated an annual license tax as discriminatory because, although applied equally to in-state and out-of-state solicitors, "the very nature of the market interstate operators serve prevents them from making full use of the privilege of doing business for which they have paid the state." 327 U.S. 416, 431 (1946) (fn. omitted); *accord*, *American Trucking Associations, Inc. v. Scheiner*, — U.S. —, 107 S. Ct. 2829, 2940-41, fn. 16, 20 and 21 (and cases cited therein) (1987). Likewise, here, the Court should take cognizance of the difference between the interstate and intrastate markets and tax bases. Specifically, the tax base on which the interstate tax is applied expands because interstate calls tend to cost more than intrastate calls, while Illinois' right over this base simultaneously shrinks because interstate calls involve proportionately less Illinois activity than intrastate calls do. For these two reasons, together *and* separately, the "equal" tax falls with disproportionate weight on the interstate calls *because* of their interstate nature. GTE Sprint Br. at 4, 49; *American Trucking*, 107 S. Ct. at 2841-42; *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963) (equal tax rate discriminatory because interstate tax base larger).

The State cavalierly dismisses both these arguments. As to cost, the State claims that in-state calls are occasionally longer and costlier than interstate calls. But the uncontested record below shows that long distance calls do tend to cost more. GTE Sprint Br. at 45-46. The operation of the tax, given this tendency, invalidates it. *American Trucking*, 107 S. Ct. at 2842 and 2844 ("the general average of instances" proves discrimination).

As to the disproportionately heavy taxation of interstate calls resulting from applying equal rates to services provided entirely and only partially in-state (Goldberg Br. at 31), the State asserts that, by considering *all* interstate phone calls, only half of which allegedly will be taxed by Illinois as the originating state (the other half by terminating states), the Illinois tax effectively taxes interstate calls at half the rate intrastate calls are taxed. State Br. at 28. This analysis is mystifying and wrong. First, it is wrong to assume that only half the Illinois originating/terminating calls will be "charged" to and therefore taxed by Illinois. *See* discussion *supra* at 3, 5-6. Second, it also is wrong to assume that no other states will tax the calls charged to Illinois, even if the charges for calls were split between originating/terminating states. Other states having contact with these calls could tax them on different phases of the calling activity (*e.g.*, on access charges) and produce disproportionate burdens on, and discrimination against, interstate calling. *See* GTE Sprint Br. at 33-46.

B. Other Existing Taxes Create Multiple Burdens and the State's Rejoinder that the Tax Will Not Overlap with Taxes on Calls Billed Elsewhere Is False and Fails To Address Numerous other Instances of Multiple Taxation

Currently existing and apportioned taxes on interstate phone calls create, together with the Illinois tax, actual multiple taxation. GTE Sprint Br. at 35-39. The State simply ignores a number of the taxes which overlap with the Illinois tax, including apportioned taxes on charges for access services (GTE Sprint Br. at 37), apportioned taxes on charges for private line services (Goldberg Br. at 29), or apportioned taxes on gross receipts from telecommunications (Goldberg Br. at 29). *See also* Hawaii tax at App. E and F hereto. Nor does the State address the complete failure of the Illinois tax under the hypothetical multiple burden analysis. GTE Sprint Br. at 34-35. Indeed, the Illinois tax fairly withers under the multiple burdens test.

The State's only rebuttal is its unsubstantiated non-record assertion that "the vast majority of [interstate] calls are charged and billed to the same number," but this assertion cannot validate the tax. First, even if true, this claim addresses only *one* instance of multiple taxation arising from other states' existing taxes on calls originating/terminating and billed/paid in those states. *See* discussion *supra* at 16; GTE Sprint Br. at 36-37. Second, it is clear calls *may* be billed in locations different from the Illinois "service address" charge location, so we know Illinois overlap with taxes on calls billed in other states is possible, despite the State's assertion. MCI Br. at 4, pp. 1-2 *supra*. Third, the tax cannot rely on the vicissitudes of external charging/billing behavior to transform it into a constitutional tax, in any event. *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, — U.S. —, 107 S. Ct. 2810, 2819 (1987) (fortuitous non-discrimination inadequate to save a tax); discussion at p. 5 *supra*.[19]

C. *Moorman* Does Not Excuse the Type of Multiple Burdens Imposed by the Illinois Tax

The State, admitting that the tax does create actual multiple burdens, maintains that this Court, in *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978), held that such burdens are excusable. The Court clearly did not do so. In *Moorman*, the tax at issue possessed an apportionment formula with external consistency. Thus, the only "excusable" multiple burdens created by the application of the tax were residual, arising from general state-to-state diversities in apportionment methodologies. As this

[19] As already shown, Sprint and other carriers do not charge to a service address location, nor need they do so; their billing locations are a matter of customer choice; and charging/billing practices are discretionary. *See* discussion *supra* at 2-3. It is therefore certain that the charge and bill locations will not necessarily coalesce, dooming the tax. *Cf. Armco, Inc. v. Hardesty*, 467 U.S. 638, 644-45 (1984) (constitutionality of tax cannot depend on shifting external events).

Court has clearly stated, that case has no application to the type of inherently unapportioned tax at issue here. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 455 (1979).

D. The Internal Consistency Test Must Include an Analysis of the Application of Like Taxes and, Properly Applied, Condemns the Tax

The State claims that the Illinois tax possesses internal consistency since, if a tax *identical* to the Illinois tax were applied in every jurisdiction, there would be no multiple taxation. Yet, the test must include consideration of the application of the tax at issue together with the application of substantively equivalent taxes, precisely because this Court is not in the business of devising nationwide statutory schemes. For example, if the State's test were applied, the Illinois tax scheme might survive; however, other states' existing taxes on calls originating/~~terminating and~~ billed there would have to be struck down, to eliminate the multiple taxation resulting from their overlap with the Illinois tax. But, in terms of the respective states' rights to tax such calls, there is no real distinction between these two taxing schemes which justifies preference of one over the other; the only difference is that Illinois taxes originating/terminating calls because charged in Illinois and the other states tax originating/terminating calls because billed there. As a consequence, applying the State's identical tax test would produce a completely arbitrary invalidation of taxes nearly indistinguishable from the Illinois tax, and would seriously hamper states' overall freedom in fashioning their taxing schemes. It must therefore be rejected. *See* GTE Sprint Br. at 26-29; *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 256 (1938) (emphasis added) (vice characteristic of those [taxes] . . . held invalid is that they have placed on the commerce burdens of such a nature as to be capable, *in point of substance,* of being imposed. . . or added to. . . with equal right by every state which the commerce touches. . .).[20]

E. The External Consistency Test Condemns the Tax and GTE Sprint's Proof Sufficiently Demonstrates It

The State claims that GTE Sprint has failed to prove that the tax fails the external consistency test because it has not submitted collective call information to show that "a highly disproportionate percentage of [all] calls between parties in Illinois and parties in other states are charged to service addresses in Illinois." State Br. at 32. GTE Sprint has already demonstrated -- through individual call examples, through the fallacies in the State's presumptions regarding charging "patterns," and through the admissions in MCI's *amicus* brief -- that the Illinois system has *no* ability, individually or collectively, to winnow out the economically significant Illinois activity or costs which contribute to interstate calling. The State's ploy of asking GTE Sprint to throw the fourth strike cannot save the tax. GTE Sprint Br. at 29-31; *see* discussion *supra* at 2-3, 5-7 and fn. 5 and 7.

III. The Illinois Tax Is Not Fairly Related to the Activities of the Taxpayer in the State

Although GTE Sprint has already shown otherwise, the State suggests that, as long as a taxpayer is somehow connected to activity taxed by Illinois, the measure of the tax must perforce be "fairly related" to the taxpayer's activities in Illinois. This test the State derives from *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) where, unlike here, there was no problem relating the measure of the tax to the taxpayer's activities because *all* the taxpayer's activities occurred within the taxing state. State Br. at 34.

[20] *See also, Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U.S. 604, 613 (1938) (Commerce Clause issue is whether two taxes laid on same activity either in form or substance); *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 174 (1939) (where "*similar* levy . . . may be imposed . . . [on] the same taxable event").

The State nevertheless claims the Illinois tax fits the *Commonwealth* mold because, it asserts, at least one party, the taxpayer, is present in Illinois for the duration of the call, and because the call is charged to an Illinois "service address." Yet some calls will be taxed by Illinois when the taxpayer participant is *not* located in Illinois to make or receive the call. MCI Br. at 4. In addition, it is clear that, although one call participant may be at and charge a call to an Illinois address, that taxpayer must still rely on concomitant out-of-state transmission and origination/receipt activity to make/receive the call. The taxpayer may also pay for the call outside the state and the taxpayer can be billed by carriers or third party vendors located anywhere. *See* discussion *supra* at 2-3. Thus, unlike *Commonwealth*, a large percentage of the taxpayer's economically significant activity does or can take place outside Illinois. However, as already demonstrated, the Illinois tax is utterly incapable of even roughly adjusting itself to the varying amount of the taxpayer in-state activities, on either an individual or collective call basis, although, because of this variation, it should. GTE Sprint Br. at 29-31; *see* discussion *supra* at 5-6.

Respectfully submitted,

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August 5, 1988

APPENDICES

APPENDIX A

In the
SUPERIOR COURT
of the
DISTRICT OF COLUMBIA

U S SPRINT COMMUNICATIONS COMPANY, TMC LONG DISTANCE OF WASHINGTON, INC. STARNET INTERNATIONAL INC. *Plaintiffs,* CABLE & WIRELESS COMMUNICATIONS, INC., *et al.*, *Intervenors,* v. MARION S. BARRY, JR., HAROLD L. THOMAS, DISTRICT OF COLUMBIA, *Defendants.*	C.A. 8599-87 No. 4011-87 (Tax Division)
AMERICAN TELEPHONE & TELEGRAPH COMPANY AND AT&T COMMUNICATIONS OF WASHINGTON, D.C., INC. *Plaintiffs,* v. MARION S. BARRY, JR., HAROLD L. THOMAS, DISTRICT OF COLUMBIA, *Defendants.*	C.A. 10080-87

PLAINTIFF CARRIERS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

* * * *

37. Most jurisdictions employ some sort of formula to apportion, for purposes of their gross receipts or similar tax, among the jurisdictions involved, the revenue from the long-distance or interstate telecommunications service which is subject to the tax and apply such a tax only to the portion of such revenue which is properly apportionable to activities within its borders. Usually, this apportionment is determined by reference to a ratio which compares the extent to which some index of measurement--such as wire mileage or value of personal property--is present in the taxing jurisdiction vs. the extent of the index generally. (Eggert testimony, Tr. 207-208).

38. In the absence of such apportionment, the same revenue from the same transaction can be subject to taxation by two or more states. This cannot happen if each state taxes only that revenue fairly apportionable to it. (Eggert testimony, Tr. 209-10; Many testimony, Tr. 258).

* * * *

43. The Act and regulations* do not apportion the revenues of each subject call between the District of Columbia and the other state or foreign country in which the call originated or terminated. The Act taxes subject calls on an "all or nothing" basis, *i.e.*, it taxes 100 percent of the price of each subject call. Built into the carrier's price for each call is the cost of access on the originating end, the cost of inter-LATA transmission, and the cost of access on the terminating end. By virtue of the interstate nature of the subject calls only one of the access costs is incurred within the District of Columbia, and only a small segment of the inter-LATA carriage. (Judicial notice; Eggert testimony, Tr. 207-08, 220; Many testimony, Tr. 270).

* * * *

* Gross Receipts Tax Amendment Act of 1987, Act 7-47, 34 D.C. Reg. 5068 (1987).

APPENDIX B

[Excerpts from GTE Northwest Incorporated's Practice Service Office System Series]

(Practice No. 052315003NW, Subsection 3)

3. BILL ADDRESS – DOMESTIC

3.01 A bill address is a customer-provided address, other than the service address, to which a bill is to be mailed. All domestic addresses conform to the standard format of city, state, and zip code.

3.02 The mnemonic BA= identifies the domestic bill address sentence.

3.03 The +BA= sentence normally contains the following elements and is written in accordance with the field parameters established for service address, with the exception of the bill post office phrase.[1]

a. House Number – five characters
b. Fraction – three characters
c. Street Direction – two characters
d. Street Name – 18 characters
e. Sublocation – 10 characters (SLOC=)
f. Billing Post Office (BPO=)

1. City or Community – 13 characters
2. State – two characters
3. Zip Code – five characters (ZIP=)

* * *

(Practice No. 052315002NW, Subsection 23)

23. SERVICE ADDRESS

23.01 Service address designates the specific location of terminating telephone equipment. It is used to satisfy all address requirements in the system unless superseded by other address data written in another service order category. Its format is consistent with Listing Category coding requirements.[23]

23.02 The mnemonic SA= identifies a service address sentence. It is written with a plus (+) action indicator. A service address is required on I and T orders. It can be changed on C and R orders, but it can never be deleted. It is invalid on F and O orders.

23.03 Service address sentence may contain the following fields:

a. House Number and Fraction (optional)

b. Street Direction (optional)

c. Street Name (optional)

d. Sublocation (optional)

e. City or Community (optional)

f. Zip Code (optional)

* * *

APPENDIX C

[US Sprint Customer Order Form]

US Sprint

MIS SERVICE ORDER FORM

DIVISION ____ BRANCH ____ DATE SOLD ____ ACTV DATE ____ CUSTOMER ID # ____

SALES REP ____ S.S. # ____ SIC # ____

TYPE OF SERVICE: ☐ ANI ☐ DIALER ☐ DIAL-UP ☐ TRAVELCARD ONLY ☐ TBS

ADD ON TO: ☐ CIS ☐ CISB ☐ GTE ☐ UST EXISTING ACCOUNT # ____ EST VOLUME $ ____ PREVIOUS CARRIER ____

BILL TO: CUSTOMER ____ BILLING PHONE NO (___) ____

ADDRESS ____ SUITE ____

CITY ____ STATE ____ ZIP ____

PHYSICAL LOCATION: ADDRESS ____ SUITE ____ PHYSICAL PHONE NO (___) ____

CITY ____ STATE ____ ZIP ____

CONTACT #1 ____ TITLE ____ PHONE NO. (___) ____

CONTACT #2 ____ TITLE ____ PHONE NO. (___) ____

ANI ORDERS: EQUAL ACCESS CUT DATE ____ CHECK BOXES BELOW FOR ANIS WITH ACCOUNT CODE FEATURE (ACF)

CUSTOMER TELCO BTN (___) ____ LIST ALL EQUAL ACCESS LINE NUMBERS TO BE SUBSCRIBED.

IF CUSTOMER'S TELCO BTN SHOULD BE SUBSCRIBED, LIST IT HERE

(___) ____ ☐ (___) ____ ☐ (___) ____ ☐ (___) ____ ☐ (___) ____ ☐

(___) ____ ☐ (___) ____ ☐ (___) ____ ☐ (___) ____ ☐ (___) ____ ☐

(___) ____ ☐ (___) ____ ☐ (___) ____ ☐ (___) ____ ☐ (___) ____ ☐

(___) ____ ☐ (___) ____ ☐ (___) ____ ☐ (___) ____ ☐ (___) ____ ☐

(continued on the following page)

AUTO DIALER ORDERS: NO. LINES ______ ACCOUNT CODES ☐ YES ☐ NO NO. SPEED PKGS. ______
☐ PBX ☐ EKS ☐ KEYSET ☐ POT ☐ TOUCH ☐ ROTARY SYSTEM FEATURES: ☐ SPEED CALL ☐ CALL FORWARD
NAME OF PHONE SYSTEM ______ MODEL NO. ______ INTERCONNECT CO. ______ PH. # (____) ______
LIST ALL LINE NO.'S TO BE COVERED WITH DIALERS:

(____) ______ (____) ______ (____) ______ (____) ______
(____) ______ (____) ______ (____) ______ (____) ______
(____) ______ (____) ______ (____) ______ (____) ______

NOTES ______

DIAL-UP SERVICE
NUMBER OF DIAL-UP CODES.
TRAVELCARD ONLY: NO. CODES ____ NO. CARDS ____
ACCOUNT CODES: CITY, STATE PHONE NO.
____ ☐ YES ☐ NO ______ ______ (____) ______
____ ☐ YES ☐ NO ______ ______ (____) ______

FEATURES: NO. TRAVEL CODES ____ NO. TRAVELCARDS ____ NO. INSPRINT PKGS ____ NO. SPEED DIAL PKGS ____ CALL DETAIL ____

BANK ______ BRANCH ______ CITY ______ STATE ______
TRADE REFERENCE #1 ______ CITY ______ STATE ______
CONTACT ______ PHONE NO. (____) ______
TRADE REFERENCE #2 ______ CITY ______ STATE ______
CONTACT ______ PHONE NO. (____) ______
TRADE REFERENCE #3 ______ CITY ______ STATE ______
CONTACT ______ PHONE NO. (____) ______

SALES REP ______ VERIFIED BY ______ MANAGER ______

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APPENDIX D

[Excerpts from US Sprint's Tariffs]

US SPRINT

TARIFF F.C.C. NO. 1
Original page ____
5th Revised page 50
Cancels 4th page 50

SPECIALIZED COMMON CARRIER SERVICE

5. RATES AND CHARGES

5.2 Usage Rates for Sprint Service From the Contiguous United States and Hawaii

A. Per-Minute Rates

This rate table should never be used without consideration of a subscriber's total usage and the application of usage discounts as described in Section 5.2.B. These rates also apply to calls made by Casual Callers.

Mileage	Day First		Day Add'l		Evening First		Evening Add'l		Night First	Night Add'l		
1-10	.1871	(R)	.1396	(R)	.1241		.0867		.0892	.0657		(C)
11-22	.2299		.1695		.1534		.1104	(R)	.1027	.0845		
23-55	.2349		.1895		.1649		.1234		.1044	.0939		
56-70	.2398		.2095		.1696		.1364		.1047	.1038		
71-124	.2410		.2095		.1696		.1364	(R)	.1047	.1038		
125-292	.2425		.2395		.1696		.1549		.1047	.1044		
293-430	.2525		.2495		.1699		.1624	(R)	.1058	.1054		
431-925	.2900		.2694		.1879	(R)	.1754		.1449	.1348	(R)	
926-1910	.3070		.2694		.2017		.1754		.1501	.1349		
1911-3000	.3227		.2794		.2211	(R)	.1819		.1640	.1399	(R)	
3001-4250	.3370		.3194		.2521		.2079		.1882	.1397		
4251+	.3530	(R)	.3394	(R)	.2649		.2209	(R)	.1967	.1691		(C)

B. Usage Discounts

As specified in the chart below, a subscriber will receive a discount on his monthly bill determined by his total monthly usage of Sprint Dial-1 and Dial-Up services. This discount will be applied to those calls between points within the contiguous United States and Hawaii and to Alaska, Puerto Rico, the U.S. Virgin Islands and Canada. To calculate the discount, the subscriber's relevant usage is multiplied by the appropriate percent discount shown below. Subscribers will receive the usage discount in effect at the close of each subscriber's billing period. Usage Discounts do not apply to Casual Callers or calls processed by using Credit Card Reader Phones.

	Total Usage		
Rate Period	**$ 0-24.99**	**$25-99.99**	**$100+**
Day Time	0.0%	3.0%	6.0%
Evening	0.0%	1.0%	2.0%
Night/Weekend	0.0%	1.0%	1.0%

ISSUED:	ISSUING OFFICER:	EFFECTIVE:
February 11, 1988	US Sprint Communications Co. Marybeth M. Banks 1850 M Street, N.W. Suite 1110 Washington, D.C. 20036	March 1, 1988

SPECIALIZED COMMON CARRIER SERVICE

4. SERVICE AND RATE DESCRIPTION (Continued)

4.4.A Sprint Advanced WATS, Sprint Advanced WATS Plus, Dial "1" WATS, Ultra WATS, US Sprint Direct 800 and US Sprint Ultra 800 Service Areas

The following matrix is to be used to determine the appropriate rate band. For SAW, SAW Plus, Dial "1" WATS and Ultra WATS, find the subscriber's NPA in the left hand column and follow the row across to identify the rate band below the terminating NPA. Then locate the corresponding per-minute rates for the appropriate WATS service as specified in Sections 5.1.B.1, 5.1.C.1, 5.1.D.1 and 5.1.E.1. For US Sprint Direct 800 and US Sprint Ultra 800, locate the subscriber's NPA in the left hand column, then follow the row across to identify the rate band below the caller's NPA. The corresponding rates will be found in Sections 5.1.H.1 and 5.1.I.1.

Subscriber's NPA	201	202	203	205	206	207	208	209	212	213	214	215	216
201		1	1	3 Z	5	1	5	5	1	5	4	1	2
202	1		2	3	5	3	5	5	1	5	4	1	2
203	1	2		4	5	1	5	5	1	5	4	1	3
205	3	3	4		5	4	4	4	3	4	3	3	3
206	5	5	5	5		5	2	3	5	4	4	5	5
207	1	3	1	4	5		5	5	1	5	4	2	3
208	5	5 Z	5	4	2 Z	5		3	5	3	4	5	4
209	5	5	5	4	3	5	3		5		4	5	5
212	1	1	1	3 Z	5	1	5	5		5	4	1	2
213	5	5	5	4	4	5	3		5		4	5	5
214	4	4	4	3	4	4	4	4	4	4		4	4
215	1	1	1	3 Z	5	2	5	5	1	5	4		2
216	2	2	3	3	5	3	4	5	2	5	4	2	
217	3	3	3	3	4	4	4	4	3	4	3	3	3
218	4	4	4	4	4	4	4	4	4	4	4 Z	4	3
219	3	3	3	3	4	3	4	4	3	4	3	3	1
301	1	1	1	3	5	3	5	5	1	5	4	1	2
302	1	1	1	3 Z	5	2	5	5	1	5	4	1	2
303	4	4	4	4	4	4	3	3	4	3	3	4	4
304	2	1	3	3	5	3	4	5	3	5	4	2	1
305	4	3	4	3 Z	5	4	5	5	4	5	4	4 Z	4 Z
307	4	4	4	4	4	4	3	3	4	3	3	4	4
308	4	4	4	3	4	4	4	4	4	4	3	4	3
309	3	3	3	3	4	4	4	4	3	4	3	3	2
312	3	3	3	3	4	3	4	4	3	4	3	3	2
313	3	2	3	3	5	3	4	5	3	5	4	3	1
314	3	3	4	2 Z	4	4	4	4	3	4	3	3	3
315	1	1	1	3 Z	5	2	5	5		5	4	1	2
316	4	4	4	3	4	4	4	4	4	4	2	4	3

ISSUED:	ISSUING OFFICER:	EFFECTIVE:
June 17, 1988	US Sprint Communications Co. Marybeth M. Banks 1850 M Street, N.W. Suite 1110 Washington, D.C. 20036	July 1, 1988

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Cancels 5th page 165.1

SPECIALIZED COMMON CARRIER SERVICE

5. RATES AND CHARGES (Continued)

5.1 Usage Rates For US Sprint WATS From the Contiguous United States, Alaska and Hawaii (Continued)

H. Per-Minute Rates For US Sprint Direct 800

.1 The following per-minute rates apply for calls originating in the NPAs specified in Section 4.4.A and terminating in cities listed in Section 3.21.F. (except for cities in Hawaii). See Section 4.4.A. for the corresponding rate bands.

DAY

BANDS	0 to 24.99 Hours	25 to 49.99 Hours	50 to 99.99 Hours	Over 100 Hours
1	$0.1557	$0.1549	$0.1534	$0.1326
2	$0.1642	$0.1632	$0.1616	$0.1609
3	$0.1686	$0.1677	$0.1661	$0.1652
4	$0.1772	$0.1766	$0.1747	$0.1739
5	$0.1814	$0.1806	$0.1786	$0.1777

EVENING

BANDS	0 to 24.99 Hours	25 to 49.99 Hours	50 to 99.99 Hours	Over 100 Hours
1	$0.1234	$0.1227	$0.1221	$0.1214
2	$0.1302	$0.1296	$0.1289	$0.1282
3	$0.1339	$0.1331	$0.1324	$0.1317
4	$0.1407	$0.1399	$0.1392	$0.1386
5	$0.1441	$0.1432	$0.1426	$0.1419

NIGHT/WEEKEND

BANDS	0 to 24.99 Hours	25 to 49.99 Hours	50 to 99.99 Hours	Over 100 Hours
1	$0.1031	$0.1031	$0.1031	$0.1031
2	$0.1086	$0.1086	$0.1086	$0.1086
3	$0.1114	$0.1114	$0.1114	$0.1114
4	$0.1169	$0.1169	$0.1169	$0.1169
5	$0.1202	$0.1202	$0.1202	$0.1202

ISSUED:	ISSUING OFFICER:	EFFECTIVE:
June 2, 1988	US Sprint Communications Co. Marybeth M. Banks 1850 M Street, N.W. Suite 1110 Washington, D.C. 20036	June 16, 1988

4. RATES AND CHARGES

4.1 Inter-City Channels

.1 Channels for Analog Transmission

Analog channels are full-duplex and offered at the following rates:

A. Long Haul Charges

MILEAGE/CKT.	RATE/MONTH/CIRCUIT
1-50	$ 54.15 + $2.16/mile for every mile
51-100	112.95 + .98/mile for every mile
101-350	144.50 + .54/mile for every mile
351-500	156.10 + .51/mile for every mile
501-1000	259.84 + .29/mile for every mile
1001-1500	273.54 + .27/mile for every mile
Over 1500	291.30 + .26/mile for every mile

B. Discounts

Discounts will apply to the monthly recurring charge per circuit, including Local Distribution Facilities charges where applicable. (N) *

1. A 5% discount will apply for customer who has 100 or more installed terrestrial channels, each over 100 miles in length. (N) *

.2 Voice Grade Multipoint Channels

Section 4.1.1 rates apply to any segment of a multipoint channel.

(N) * Issued in accordance with Special Permission No. 86-643 of the Federal Communications Commission to be effective on not less than five days' notice.

APPENDIX E

Hawaii's General Excise Tax Law Chapter 237 [Excerpts]

* * * *

§ 237-13 Imposition of tax. There is hereby levied and shall be assessed and collected annually privilege taxes against persons on account of their business and other activities in the State measured by the application of rates against values of products, gross proceeds of sales, or gross income, whichever is specified, as follows:

* * * *

(6) Tax on service business. Upon every person engaging or continuing within the State in any service business or calling not otherwise specifically taxed under this chapter, there is likewise hereby levied and shall be assessed and collected a tax equal to four per cent of the gross income of any such business; provided that where any person engaging or continuing within the State in any service business or calling renders such services upon the order of or at the request of another taxpayer who is engaged in the service business and who, in fact, acts as or acts in the nature of an intermediary between the person rendering such services and the ultimate recipient of the benefits of such services, so much of the gross income as is received by the person rendering the services shall be subjected to the tax at the rate of one-half of one per cent and all of the gross income received by the intermediary from the principal shall be subjected to a tax at the rate of four per cent; and provided that where any person is engaged in the business of selling interstate or foreign common carrier telecommunication services within and without the State, the tax shall be imposed on that portion of gross income received by any such person from service which is originated or

terminated in this State and is charged to a telephone number, customer, or account in this State notwithstanding any other state law (except for the exemption under section 237-23(a)(2)) to the contrary. If, under the Constitution and laws of the United States, the entire gross income as determined under this paragraph of a business selling interstate or foreign common carrier telecommunication services cannot be included in the measure of the tax, such gross income shall be apportioned as provided in section 237-21; provided that the apportionment factor and formula shall be the same for all persons providing such services in the State.

* * * *

§ 237-21 **Apportionment.** If any person, other than persons liable to the tax on manufacturers as provided by section 237-13(1), is engaged in business both within and without the State or in selling goods for delivery outside the State, and if under the Constitution or laws of the United States or section 237-29.5 or 237-29.6 the entire gross income of such person cannot be included in the measure of this tax, there shall be apportioned to the State and included in the measure of the tax that portion of the gross income which is derived from activities within the State, to the extent that the apportionment is required by the Constitution or laws of the United States or section 237-29.5 or 237-29.6. In the case of a tax upon the production of property in the State the apportionment shall be determined as in the case of the tax on manufacturers. In other cases, if and to the extent that the apportionment cannot be accurately made by separate accounting methods, there shall be apportioned to the State and included in the measure of this tax that proportion of the total gross income, so requiring apportionment, which the cost of doing business within the State, applicable to the gross income, bears to the cost of doing business both within and without the State, applicable to the gross income. [L 1941, c 115, §1; RL 1945, §5457; RL 1955, §117-18; am L 1959, c 277, §2; HRS §237-21; am L 1987, c 239, §5]

APPENDIX F

DEPARTMENT OF TAXATION

[Excerpts from Proposed] Rule Amending Chapter 18-237, Hawaii Administrative Rules

June 21, 1988

SUMMARY

§ 18-237-13, Hawaii Administrative Rules, is amended by amending subsection (f) with a new paragraph (3).

1. § 18-237-13 is amended.

* * * *

Section 18-237-13, Hawaii Administrative Rules, is amended by amending subsection (f) to read as follows:

* * * *

(3) Telecommunication Services.

(A) Scope. Paragraph (3) is intended to provide uniform rules of administrative procedure to govern the taxation of the telecommunication industry pursuant to section 237-13(6), HRS, of the general excise tax law. Paragraph (3) shall not apply to gross income that is taxable under chapter 239, HRS, the public service company tax law.

(B) Definitions. As used in this paragraph, unless the context otherwise requires:

"Directly related to Hawaii" means geographically located within Hawaii or allocated to Hawaii according to generally accepted accounting principles and practices.

"Foreign common carrier" means any person operating under the legal jurisdiction of a country other than the United States which

provides transmission service to the public in general or to specified classes of the public.

"Gross income" means the gross receipts, as defined in section 237-3, HRS, of a long distance carrier.

"Interexchange carrier" means any person which provides transmission service between calling areas within a state.

"Interstate telecommunications" means all telecommunications that either originate or terminate outside of this State.

"Intrastate telecommunications" means all telecommunications that originate and terminate within this State.

"Long distance carrier" means any interexchange carrier or foreign common carrier which purchases, installs, rents, or leases a telephone system, telecommunication system, or telecommunications service for the interexchange or foreign common carrier's own use to provide the interexchange or foreign common carrier or other persons with telephonic interstate or international telecommunication service which is wholly or partially independent of any local exchange system or an intrastate or interstate interexchange network or which is a substitute for any dedicated facility by which an interexchange or foreign common carrier provides a telephonic communication path in the State.

"Telecommunication service" means the transmission, conveyance, routing, or reception of any electronic, electromagnetic interactive transmission, or any other kind of energy force variations of information in any

form, including but not limited to voice, image, data, or printed copy signal by means of wires, cables, radio waves, laser microwaves, satellites, fiber optics, any combination of these media, or any other method now in existence or that may be devised.

(C) Application. (i) Paragraph (3) shall apply to all long distance carriers conducting business, by providing telecommunication service, in the State.

(ii) The income of a long distance carrier that is subject to tax is that portion of gross income received by any long distance carrier from telecommunication service which is originated or terminated in this State and is charged to a telephone number, customer, or account in this State.

(iii) Apportionment. Under the Constitution and laws of the United States, the entire gross income as determined in clause (ii) cannot be included in the measure of tax; such gross income shall be apportioned by using the apportionment formula in subparagraph (E)(i).

(D) Apportionment factor. (i) The apportionment factor shall be as follows:

$$\frac{\text{HCOP}}{\text{NHOA} + \text{NHTA} + \text{HCOP} + \dfrac{(\text{HBI})}{(\text{NBI})} \times \text{NCOP}}$$

HBI = Hawaii Billed Income originating or terminating in the State and charged to a telephone number, customer, or account in the State.

HCOP = Hawaii Cost of Operations includes those costs charged, under a long distance carrier's

normal method of accounting, to the following tax return and Federal Communication Commission-prescribed account titles or their equivalents, which are directly related to Hawaii.

—Cost of Operations
—Contributions
—Bad Debts
—Operating Expenses
—Hawaii Originating or Terminating Connection
—Expenses or Access Fees or Costs
—General and Administrative Expenses
—Advertising Expenses
—Leases
—Payroll
—Maintenance, including repair to:
  Cables
  Central Office Equipment
  Buildings and Grounds
  Maintenance of Transmission Power
  Other Maintenance Expenses
—Depreciation and Amortization Expenses
—Traffic Expenses
—Commercial Expenses other than advertising
—General Office Salaries and Expenses other than general and administrative expenses and payroll
—Insurance
—Accidents and Damages
—Operating Rents
—Relief and Pensions
—Operating Taxes
—Miscellaneous Deductions From Income

NBI=Nationwide Billed Income received from providing telecommunication service.

NCOP=Nationwide Cost of Operations includes the tax return and Federal Communication Commission-prescribed account titles or equivalents described by HCOP above. NCOP specifically excludes costs included in HCOP, NHOA, NHTA,

and connection expenses or access fees not included in HCOP, NHOA, or NHTA.

NHOA=Non-Hawaii Originating Access Cost relating to HBI, which may be

(1) The actual non-Hawaii originating access cost relating to a specific call resulting in Hawaii billed income; or

(2) A reasonable estimate derived by using the nationwide or Hawaii trunk average access cost per unit to originate calls multiplied by the number of calls terminating in Hawaii resulting in Hawaii billed income; or

(3) A reasonable estimate using the proportional relationship of the Hawaii trunk originating and terminating access costs to derive the non-Hawaii originating access costs as a proportion of the total Hawaii terminating access costs.

NHTA=Non-Hawaii Terminating Access Cost relating to HBI, which may be

(1) The actual non-Hawaii terminating access cost relating to a specific call resulting in Hawaii billed income; or

(2) A reasonable estimate derived by using the nationwide or Hawaii trunk average access cost per unit to terminate calls multiplied by the number of calls originating in Hawaii resulting in Hawaii billed income; or

(3) A reasonable estimate using the proportional relationship of the Hawaii trunk originating and terminating access costs to derive the non-Hawaii terminating access costs as a proportion of the total Hawaii originating access costs.

Example: ABC Long Distance does not have figures for access costs for specific phone calls and decides it can reasonably estimate its non-Hawaii access costs on a per unit basis as allowed by (2). For ABC Long Distance, the originating access cost is eighty cents ($.80) and the terminating access cost is one dollar ($1.00) through the local exchange in Hawaii or on a nationwide basis for each call. If ABC Long Distance customers place 200,000 outgoing calls and receive 100,000 incoming calls during the reporting period, the NHTA would be estimated to be (200,000 × $1.00) $200,000 and the NHOA as (100,000 × $.80) $80,000.

Example: XYZ Long Distance decides to make its estimate for non-Hawaii access costs on a proportional basis as allowed by (3). Assume the same cost relationship for Hawaii-located originating and terminating access costs exist for XYZ as in the above example. Therefore, if it costs $1.00 to terminate a call in Hawaii and $.80 to originate a call, the originating access cost is equivalent to eighty percent of the terminating access cost. If XYZ Long Distance incurs four million dollars ($4,000,000) in originating access costs and one million dollars ($1,000,000) in terminating access costs in Hawaii, then XYZ Long Distance's non-Hawaii terminating access costs may be calculated as follows:

$$\frac{\$4.0M}{.8} = \$5.0M$$

XYZ Long Distance's non-Hawaii originating access costs may be calculated as follows:

$$\$1.0M \times .8 = \$.8M \text{ or } \$800,000$$

(ii) The apportionment factor shall be multiplied by the gross income received or accrued by each long distance carrier from telecommunication service which is originated or terminated in this State and is charged to a telephone number, customer, or account in this State to determine the portion of gross income subject to tax.

(iii) The apportionment factor shall be uniformly applied to the gross income received or accrued from telecommunication service by all long distance carriers conducting business within and outside of the State.

(iv) The director may periodically review, evaluate, and adjust the apportionment factor to reflect any changes in the industry as necessary.

(E) Apportionment formula. (i) The apportionment formula shall be as follows:

$$\frac{HCOP}{NHOA + NHTA + HCOP + \frac{(HBI)}{(NBI)} \times NCOP} \times HBI = AHGI$$

AHGI = Apportioned Hawaii Gross Income received from providing telecommunication service in the State.

All other components are as described in subparagraph (D)(i).

Example: Aloha Communications, a local long distance carrier with no portion of its operations located out-of-Hawaii, provides long distance telephone service exclusively to customers in Hawaii. The billings total for all long distance telephone calls that originate or terminate in Hawaii and which are billed to a customer, number, or ac-

count in Hawaii is ten million dollars ($10,000,000). Aloha's nationwide billings total is also ten million dollars ($10,000,000) as all of its billings are made to Hawaii customers. The Hawaii cost of operations amount to seven million dollars ($7,000,000). The nationwide cost of operations, which excludes the Hawaii cost of operations, is zero. The non-Hawaii originating access costs related to the Hawaii-billed calls income is one-hundred-fifty thousand dollars ($150,000). The non-Hawaii terminating access costs relating to Hawaii-billed calls is one million five-hundred thousand dollars ($1,500,000).

The gross income received from telephone calls originating or terminating in Hawaii and billed to a customer, number, or account in Hawaii is apportioned as follows:

$$\frac{\$7M}{\$.15M+\$1.5M+\$7M+\frac{(\$10M)}{(\$10M)}\times 0} \times \$10M =$$

$8,092,485.55

The factor set out in subparagraph (D)(i), multiplied by the long distance carrier's Hawaii billed calls income of $10,000,000, equals the amount of gross income that is subject to tax, in this instance, $8,092,485.55.

Example: ABC Long Distance Company, an out-of-state long distance carrier that sells long distance telephone services to nationwide customers, has a branch office located in Hawaii which provides long distance telephone services in conjunction with its out-of-state offices. The amount of the Hawaii billed calls income is one hundred million dollars ($100,000,000). The Hawaii cost of operations is seventy million dollars ($70,000,000).

The nationwide billed income is eight billion dollars ($8,000,000,000). The nationwide cost of operations, excluding the Hawaii cost of operations, Hawaii-related originating and terminating access costs, and non-Hawaii-related access cost, is three billion dollars ($3,000,000,000). The non-Hawaii originating access cost relating to Hawaii billed calls income is one million five hundred thousand dollars ($1,500,000). The non-Hawaii terminating access cost relating to Hawaii billed calls income is fifteen million dollars ($15,000,000).

The gross income received from telephone calls originating or terminating in Hawaii and billed to a customer, number, or account in Hawaii is apportioned as follows:

$$\frac{\$70M}{\$1.5M+\$15M+\$70M+\frac{(\$100M)}{(\$8B)}\times \$3B} \times$$

$100,000,000 = $56,451,612.90

The factor set out in subparagraph (D)(i), multiplied by the long distance carrier's Hawaii billed calls income of $100,000,000, equals the amount of gross income that is subject to tax, in this instance, $56,451,612.90.

(ii) The apportionment formula shall be uniformly applied to the gross income received or accrued from telecommunication service by all long distance carriers conducting business within and outside of the State.

(iii) The director may periodically review, evaluate, and adjust the apportionment formula to reflect any changes in the industry as necessary.
[Eff. ____________] (Auth: sections 231-3(9), 237-8, HRS) (Imp: section 237-13(6), HRS)

* * *